Subsec. (d)(4)(C). Pub. L. 103–198, §6(a)(6), substituted ''Librarian of Congress'' for ''Copyright Royalty Tribunal''.

1990—Subsec. (c)(2)(B). Pub. L. 101–318, §3(a)(1), struck out ''recorded the notice specified by subsection (d) and'' after ''where the cable system has not''.

Subsec. (d)(2). Pub. L. 101–318, §3(a)(2)(A), substituted ''clause (1)'' for ''paragraph (1)''.

Subsec. (d)(3). Pub. L. 101–318, §3(a)(2)(B), substituted ''clause (4)'' for ''clause (5)'' in introductory provisions.

Subsec. (d)(3)(B). Pub. L. 101–318, §3(a)(2)(C), substituted ''clause (1)(A)'' for ''clause (2)(A)''.

1988—Subsec. (a)(4), (5). Pub. L. 100–667, §202(1)(A), added par. (4) and redesignated former par. (4) as (5).

Subsec. (d)(1)(A). Pub. L. 100–667, §202(1)(B), inserted provision that determination of total number of subscribers and gross amounts paid to cable system for basic service of providing secondary transmissions of primary broadcast transmitters not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing under section 119.

1986—Subsec. (d). Pub. L. 99–397, §2(a)(1), (4), (5), substituted ''paragraph (1)'' for ''clause (2)'' in par. (3), struck out par. (1) which related to recordation of notice with Copyright Office by cable systems in order for secondary transmissions to be subject to compulsory licensing, and redesignated pars. (2) to (5) as (1) to (4), respectively.

Pub. L. 99–397, §2(a)(2), (3), which directed the amendment of subsec. (d) by substituting ''paragraph (4)'' for ''clause (5)'' in pars. (2) and (2)(B) could not be executed because pars. (2) and (2)(B) did not contain references to ''clause (5)''. See 1990 Amendment note above.

Subsec. (f). Pub. L. 99–397, §2(b), substituted ''subsection (d)(1)'' for ''subsection (d)(2)'' in third undesignated par., defining a cable system.

Pub. L. 99–397, §1, inserted provision in fourth undesignated par., defining ''local service area of a primary transmitter'', to cover that term in relation to low power television stations.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–39 effective 3 months after Nov. 1, 1995, see section 6 of Pub. L. 104–39, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by section 3(b) of Pub. L. 103–369 effective July 1, 1994, see section 6(d) of Pub. L. 103–369, set out as an Effective and Termination Dates of 1994 Amendment note under section 119 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 3(e)(1) of Pub. L. 101–318 provided that: ''The amendments made by subsections (a) and (b) [amending this section and section 801 of this title] shall be effective as of August 27, 1986.''

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–667 effective Jan. 1, 1989, see section 206 of Pub. L. 100–667, set out as an Effective Date note under section 119 of this title.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

CROSS REFERENCES

Action for infringement of copyright, see section 501 of this title.

Exclusive rights in copyrighted works, see section 106 of this title.

Institution and conclusion of proceedings—

Distribution of royalty fees, see section 803 of this title.

Owner or users of copyrighted work whose royalty rates are specified by this section, see section 803 of this title.

Remedies for alteration of programing by cable systems, see section 510 of this title.

Royalty rate and fees—

Determination concerning adjustment of copyright royalty rate, see section 801 of this title.

Distribution of copyright royalty fees, see section 801 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 110, 114, 119, 501, 510, 511, 801, 802, 803 of this title; title 18 section 2319; title 47 sections 325, 534.

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(1) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(2) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(3) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic mu-

sical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if—

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.

(Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2558.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Section 112 of the bill concerns itself with a special problem that is not dealt with in the present statutes but is the subject of provisions in a number of foreign statutes and in the revisions of the Berne Convention since 1948. This is the problem of what are commonly called ''ephemeral recordings'': copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.

Recordings for Licensed Transmissions. Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a sound recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization's own transmissions within its own area; after 6 months it must be destroyed or preserved solely for archival purposes.

Organizations Covered.—The ephemeral recording privilege is given by subsection (a) to ''a transmitting organization entitled to transmit to the public a performance or display of a work.'' Assuming that the transmission meets the other conditions of the provision, it makes no difference what type of public transmission the organization is making: commercial radio and television broadcasts, public radio and television broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth. However, to come within the scope of subsection (a), the organization must have the right to make the transmission ''under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a).'' Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organization must be a transferee or licensee (including compulsory licensee) of performing rights in the work in order to make an ephemeral recording of it.

Some concern has been expressed by authors and publishers lest the term ''organization'' be construed to include a number of affiliated broadcasters who could exchange the recording without restrictions. The term is intended to cover a broadcasting network, or a local broadcaster or individual transmitter; but, under clauses (1) and (2) of the subsection, the ephemeral recording must be ''retained and used solely by the transmitting organization that made it,'' and must be used solely for that organization's own transmissions within its own area. Thus, an ephemeral recording made by one transmitter, whether it be a network or local broadcaster, could not be made available for use by another transmitter. Likewise, this subsection does not apply to those nonsimultaneous transmissions by cable systems not located within a boundary of the forty-eight contiguous States that are granted a compulsory license under section 111.

Scope of the Privilege.—Subsection (a) permits the transmitting organization to make ''no more than one copy or phonorecord of a particular transmission program embodying the performance or display.'' A ''transmission program'' is defined in section 101 as a body of material produced for the sole purpose of transmission as a unit. Thus, under section 112(a), a transmitter could make only one copy or phonorecord of a particular ''transmission program'' containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other ''transmission programs.''

Three specific limitations on the scope of the ephemeral recording privilege are set out in subsection (a), and unless all are met the making of an ''ephemeral recording'' becomes fully actionable as an infringement. The first requires that the copy or phonorecord be ''retained and used solely by the transmitting organization that made it,'' and that ''no further copies or phonorecords are reproduced from it.'' This means that a transmitting organization would have no privilege of exchanging ephemeral recordings with other transmitters or of allowing them to duplicate their own ephemeral recordings from the copy or phonorecord it has made. There is nothing in the provision to prevent a transmitting organization from having an ephemeral recording made by means of facilities other than its own, although it would not be permissible for a person or organization other than a transmitting organization to make a recording on its own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to copies or phonorecords made

in advance for later broadcast, as well as recordings of a program that are made while it is being transmitted and are intended for deferred transmission or preservation.

Clause (2) of section 112(a) provides that, to be exempt from copyright, the copy or phonorecord must be ''used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security''. The term ''local service area'' is defined in section 111(f).

Clause (3) of section 112(a) provides that, unless preserved exclusively for archival purposes, the copy or phonorecord of a transmission program must be destroyed within six months from the date the transmission program was first transmitted to the public.

Recordings for Instructional Transmissions. Section 112(b) represents a response to the arguments of instructional broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make not more than thirty copies or phonorecords and to use the ephemeral recordings for transmitting purposes for not more than seven years after the initial transmission.

Organizations Covered.—The privilege of making ephemeral recordings under section 112(b) extends to a ''governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a).'' Aside from phonorecords of copyrighted sound recordings, the ephemeral recordings made by an instructional broadcaster under subsection (b) must embody a performance or display that meets all of the qualifications for exemption under section 110(2). Copies or phonorecords made for educational broadcasts of a general cultural nature, or for transmission as part of an information storage and retrieval system, would not be exempted from copyright protection under section 112(b).

Motion Pictures and Other Audiovisual Works.—Since the performance exemption provided by section 110(2) applies only to nondramatic literary and musical works, there was no need to exclude motion pictures and other audiovisual works explicitly from the scope of section 112(b). Another point stressed by the producers of educational films in this connection, however, was that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for exactly the same market. They argued that it is unfair to allow instructional broadcasters to reproduce multiple copies of films and tapes, and to exchange them with other broadcasters, without paying any copyright royalties, thereby directly injuring the market of producers of audiovisual works who now pay substantial fees to authors for the same uses. These arguments are persuasive and justify the placing of reasonable limits on the recording privilege.

Scope of the Privilege.—Under subsection (b) an instructional broadcaster may make ''no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display.'' No further copies or phonorecords can be reproduced from those made under section 112(b), either by the nonprofit organization that made them or by anyone else.

On the other hand, if the nonprofit organization does nothing directly or indirectly to authorize, induce, or encourage others to duplicate additional copies or phonorecords of an ephemeral recording in excess of the limit of thirty, it would not be held responsible as participating in the infringement in such a case, and the unauthorized copies would not be counted against the organization's total of thirty.

Unlike ephemeral recordings made under subsection (a), exchanges of recordings among instructional broadcasters are permitted. An organization that has made copies or phonorecords under subsection (b) may use one of them for purposes of its own transmissions that are exempted by section 110(2), and it may also transfer the other 29 copies to other instructional broadcasters for use in the same way.

As in the case of ephemeral recordings made under section 112(a), a copy or phonorecord made for instructional broadcasting could be reused in any number of transmissions within the time limits specified in the provision. Because of the special problems of instructional broadcasters resulting from the scheduling of courses and the need to prerecord well in advance of transmission, the period of use has been extended to seven years from the date the transmission program was first transmitted to the public.

Religious Broadcasts.—Section 112(c) provides that it is not an infringement of copyright for certain nonprofit organizations to make no more than one copy for each transmitting organization of a broadcast program embodying a performance of a nondramatic musical work of a religious nature or of a sound recording of such a musical work. In order for this exception to be applicable there must be no charge for the distribution of the copies, none of the copies may be used for any performance other than a single transmission by an organization possessing a license to transmit a copyrighted work, and, other than for one copy that may be preserved for archival purposes, the remaining copies must be destroyed within one year from the date the program was first transmitted to the public.

Despite objections by music copyright owners, the Committee found this exemption to be justified by the special circumstances under which many religious programs are broadcast. These programs are produced on tape or disk for distribution by mail of one copy only to each broadcast station carrying the program. None of the programs are prepared for profit, and the program producer either pays the station to carry the program or furnishes it free of charge. The stations have performing licenses, so the copyright owners receive compensation. Following the performance, the tape is returned or the disk destroyed. It seems likely that, as has been alleged, to require a second payment for the mechanical reproduction under these circumstances would simply have the effect of driving some of the copyrighted music off the air.

Ephemeral Recordings for Transmissions to Handicapped Audiences. As a counterpart to its amendment of section 110(8), the Committee adopted a new provision, subsection (d) of section 112, to provide an ephemeral recording exemption in the case of transmissions to the blind and deaf. New subsection would permit the making of one recording of a performance exempted under section 110(8), and its retention for an unlimited period. It would not permit the making of further reproductions or their exchange with other organizations.

Copyright Status of Ephemeral Recordings. A program reproduced in an ephemeral recording made under section 112 in many cases will constitute a motion picture, a sound recording, or some other kind of derivative work, and will thus be potentially copyrightable under section 103. In section 112(e) it is provided that ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them.

CROSS REFERENCES

Action for infringement of copyright, see section 501 of this title.

Exclusive rights in copyrighted work, see section 106 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 501, 511 of this title; title 18 section 2319.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to re-